

SUPREME COURT.

OCTOBER TERM.

WEDNESDAY, OCT. 23.

CONTINUATION OF THE WILCOX CONSPIRACY TRIAL.

Court convened at 9:30 o'clock, Chief Justice Judd presiding. The cross examination of James Kaubane was continued by Mr. Kalua; the only new statements elicited being as here given: James Kaubane (continuing)—Do not think that the police were frightened; they fell into line without resistance or objection; they marched in line with us; they had their badges on; at the palace think one of our men got on a policeman's shoulders and got over the gate; did not hear the officer consent nor object; have spoken with Smith and Markham since the Loomens trial; only spoke about the change in charge against Wilcox from treason to conspiracy; Markham did not say here Kaubane we will put all the blame on Wilcox; after a little further questioning the witness was allowed to retire.

Alex. Smith (by the Attorney-General)—Markham introduced me to Wilcox; I was a member of the political association; joined July 11th, through invitation of Markham; Wilcox asked me if Markham had told me what was going on; I said no; Wilcox explained to me the objects, I was to love the King; thought object good; I took oath; he read from a book; I was boozed and cannot recollect what the substance of it was; was warned not to divulge it; I asked Markham when we would go home; he said we were to wait for Baker; saw Baker there; proposition made to go to palace that night; it was postponed by Baker's influence; Markham and Boyd they jumped up and had revolvers; they told Baker that although he was a big man he was a coward; Markham took us in little room and showed us arms; he said that he and Boyd had been arranging the arms all day; after ten days Mr. Markham came to my house and said Baker is a coward; I think we had better make move; on the 25th went there and took some men with me by direction of Markham; Markham went down in back and came back with pistols, rice-bird guns, and rifles; had a meeting and Wilcox appointed officers and wished them to decide whether we should move that night or not; Markham came to me and told me that I was an officer to go in next room; we then had a meeting; I made a resolution that we go; Wilcox was there; I said that the best thing for us was to go to Honolulu and then if we did not find the King to go to the boathouse; if we found him Wilcox could present his constitution and if the King signed it we would be all right; if the King would not then we would ask him to let us go; Boyd said best way to move right on the palace we could get all the guns; Kauai made a motion that we go in palace direct, and that was passed; we then adjourned until about 3; then Markham and Boyd came to me and told me to get my boys together and so Kaahua and I did; the rice-guns had all been loaded by Boyd; Wilcox wanted Kaahua to lead, but it was suggested after that I take the lead; I took the lead of column at Wilcox's order; Wilcox told me if we met anyone on the road to put them in the ranks; saw a man on road; he was a policeman; I took him into line; was going to go in Richard street entrance but Wilcox said no; I gave the command halt; Wilcox asked for Kuamoo; understood that Kuamoo had passed word; he said he had forgotten it; a policeman got close to the gate and one of our men got on his back and climbed over the gate and opened it; staid in palace all day; was officer of the guard; Wilcox assigned me; orders were not to allow any foreigners to come in; natives were allowed in; took possession about 5 a. m.; heard Parker say to Wilcox that he was going to take his own men into palace, and Wilcox could guard the gates; Wilcox asked Parker for possession of the ammunition and guns in the palace; Parker told him to go to Kaha-lawai; Parker left the yard twice that morning; Kahananui was in charge of squad that took Government house; I had them to location—Kahananui not being capable of command; the squad numbered twelve or fourteen; I got the cannon and placed them in position; Wilcox, Markham and Boyd gave me the orders; Markham and Boyd told me the people outside would be frightened when they saw the cannon; Kaahua was sent with a squad of men and a carriage for the King; the King did not come; I was on manka side of Wilcox and Kaahua when man named Kuou ran up to us and told us Mr. Damon was outside the gate; man told me; Wilcox heard it; think Kuou was guard, and also Luika, at makai gate; Wilcox and I then marched towards the gate and came by Boyd's cannon; he told us to get out of the way he wanted to fire then, because he saw some one in the Music Hall pulling down a window; Wilcox stopped him; we walked on to ward the gate when a gun fired from the Music Hall; Wilcox sung out to Music Hall to "stop firing! stop firing!" three or four more shots were fired from there and then Wilcox gave order to fire; cannons were then fired; think Wilcox knew that Government were gathering forces to drive us out; not my place to surrender; know Schumann; heard that one of the Rifles caught; Schumann asked Wilcox for his gun and belt; Wilcox refused those but told him he could go; when the firing opened I was not looking for Wilcox I went and hid myself; I hid myself in the basement; Wilcox did not go with me, he came there about half an hour after; he did not step and Parker asked us to come in the palace and get something to eat, and then he told us to get a long stick and put handkerchief on and go out the gate; when we came out Rifles ordered us into Government house and we were arrested.

Cross-examined by Mr. Kalua—Markham gave me the wine. He did not give it to others. I was intoxicated. The oath was in English.

Counsel for defense now asked "what did Markham say to you?" Counsel for prosecution objected. The Court finally allowed the question in an amended form and the witness resumed his answers to the cross-examination.

There were two guns of mine that I gave to Wilcox, and Markham came to me and desired me to say that Wilcox had paid me for them. (This answer was ruled out by the Court as not evidence). I took a number of men, maybe twenty in all to meeting of 29th. I used same inducements as offered me that there would be a feast. Kaahua brought a number so did Markham and Boyd. Heard that Poepee brought one man. Wilcox and I asked Kuamoo for pass-

word. He said he had forgotten it. Wilcox and Parker talked together shortly after we went in. It would have been very easy to have taken the palace when Parker left. Wilcox could have taken it easily and safely if he wished to. Kaahua went for the King a little past 6 o'clock. When Kaahua came back I was in charge of gates. Ceased to be in that position after the firing. I ran and hid myself. Took shelter with about fifty others in the basement. There is still a charge of conspiracy pending against me.

To a Juror—Wilcox did not tell us to fire the cannons. Wilcox did not tell us any particular time to fire them. We fired because we were fired at. Would not have done so unless we had been fired at. (Applause from spectators).

The Court—Am sorry that I have to speak to these people here, most of whom, I believe, are out on bail for conspiracy. It is very improper to give applause, it is a seeming endeavor to influence the jury. I repeated I shall have officers to put such persons under arrest for contempt of Court. May say, that applause is intolerable to this Court and will not be allowed. I do not wish to speak again.

To the Court—Don't know how long we were going to stay. Markham said two days.

G. Schumann—Was on the corner of King and Likeli streets on July 30th last. Was sent there by the Government. Sent by the captain of my company. Belong to Company D. Honolulu Rifles. Captain McCarthy was my captain. Think we were acting under authority of Hawaiian Government. I saw others going out so I went out too. I got into a row with some native. I had orders to prevent any one passing through Likeli street. Some one yelled from palace to bring that man in. Wilcox called out. A native fired a shot there. The native was sitting on top of the wall. No guns were fired before that. Could not tell direction gun was fired. Somebody took my rifle away from me and then I was taken inside palace yard. Wilcox spoke to me. He asked me what I was doing there. Said I was acting under orders of the Hawaiian Government to keep the peace. He said he was the Hawaiian Government. My cartridge belt was also taken away. Only kept under arrest one hour, then I was allowed to go outside. Wilcox told me to go out. During the time I was there they were firing at the Music Hall. Wilcox went all over the yard. Saw him firing off cannons. When I went out he was sitting on back stairs.

Court now took recess until 1 o'clock.

AFTERNOON SESSION.

The Court resumed at 1 o'clock and the cross examination of witness was commenced by Mr. Kalua.

G. Schumann—I am not a police officer; I received my orders from my captain; do not know whether the government gave the orders or not.

Juror Bipikane—Did your captain tell the people they should clear away.

Answer by witness—I don't know, I think so, that was my orders.

Juror Bipikane—The road was a public road, who were the enemies that you were afraid of, those inside or those outside.

Answer of witness indistinct and indefinite.

Juror Bipikane now said, turning his face to the audience: I think this man used his gun in a threatening manner towards the people outside and that is the reason why they caught him and threw him over the wall. I think they were right; (sensation).

Mr. Hatch (rising quickly)—If your Honor please, we feel called upon at this stage in consequence of what has been said by this juror to move your Honor to discharge the jury on the ground of bias and misconduct.

Mr. Rosa for the defense objected strongly to the motion and considered that nothing had occurred that should disqualify the jurors; the defendant had rights that he should be protected in, and if the jury were now discharged it would be equal to an acquittal.

Mr. Hatch called the attention of the Court to page 556 (Note 1) of Archibald's Criminal Practice and read:

"The law has invested Courts of Justice with authority to discharge a jury from giving any verdict whenever in their opinion taking all the circumstances into consideration there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject and when a plea of discharge of the jury is imposed under such circumstances, such plea will not constitute a bar to further proceedings and will give no right of exception to the prisoner from being again put on trial."

Mr. Rosa continuing, said in substance that there was no doubt that the Court had recognized the tone and manner used by the juror, and further the juror had stated his opinion, an opinion which is not based upon the evidence. That opinion must have been one which he had formed and concealed; it seemed to the speaker that the juror had entered upon the case prejudiced.

Mr. Rosa drew the attention of the Court to Merriam on Juries, page 352 section 312 and read:

"When a prisoner has been arraigned and tried upon a valid indictment he is entitled to the verdict of the jury before they are discharged."

The Attorney-General called to the notice of His Honor Article 8 of the Hawaiian Constitution which states that "No person shall be required to answer again for an offense of which he has been duly convicted or of which he has been duly acquitted." He argued that if the case had gone to the jury and a verdict had been rendered they could not well revive it. The Court at any time, he considered, had power to take the case from a jury if it was found not safe in the interests of justice to allow it to remain in their hands. It was mentioned to him just now by Mr. Thurston that on a jury case before the late Judge Harris the jury had even retired and returned and on stating that they could not agree, standing 8 to 4, Judge Harris promptly dismissed them from further consideration of the case on the ground that they had transcended their duties as jurors by telling him the condition in which they stood.

CHIEF JUSTICE JUDD'S RULING.

The Court—I took a commission as a Judge of this Court from His Majesty a few days after he was elected as the King of this country. I have presided over a great many jury trials numbering in the hundreds by this time. In all my experience I have never known a Hawaiian juror, or in fact any juror, to express an opinion during the process of the trial as the juror Bipikane did this afternoon.

In the morning session when the evidence of Alexander Smith was closing,

or after it was closed, this juror asked a question like this: Did Mr. Wilcox tell you at what hour to fire, at what time to fire? And then he asked the question: Would you have fired all day, you people in there, if they had not fired first at you? Then later, at the close of the present witness's evidence, he asked whether the captain under whom this young man served as a rifle-man, whether he told the people that they must not go there, or that they must clear out from that place, not to pass along there. Then the juror remarked that it was a public road, and asked what right he had to stop people from passing in the public road. He also asked who were his enemies that day, whether the people inside or the people outside. Then he said finally: "I think this haole used his gun in a threatening manner towards the people and that is the reason they caught him and threw him over the wall, threw him into the yard."

My opinion is, and I give it deliberately, and am perfectly willing to take the responsibility of it, too,—if there is no precedent for it I will make a precedent, judges have got to make precedents sometimes. If a juror by his manner, by his gestures, and it made an effect upon the other jurymen I suppose, because it had effect upon the audience, whenever he asks such questions and makes use of such expressions as these, I say it is misconduct of the worst kind.

I think that the citations mentioned by Mr. Hatch show that the Court will find ample precedents in other countries for a similar course, but that makes no difference to me. I am aware that it only requires nine to give a verdict, but I cannot look into the human mind and know what influence this juror may have over his fellows. The defendant himself wishes to be acquitted on the law and the evidence, and I suppose wants to have a fair trial and be vindicated. Now, to proceed further with this case with such an exhibition of feeling on the part of one juror I think would be a mockery of justice, and I will discharge the jury now from further consideration of this case. You are excused, gentlemen.

As the jury left the box the Attorney-General said that before the Court was adjourned he desired it of record that the juror Bipikane be summoned by His Honor for contempt.

The Chief Justice said that the occurrence was unfortunate but he had no personal feeling against the juror.

The Attorney-General said that he also had no personal feelings against the juror and if his Honor considered it advisable he would not press the charge.

The jury were discharged at 2:10 p. m. and at 2:15 the Court was adjourned until Thursday morning at 10 o'clock, at which time case No. 4: the King vs. Poal and eighteen others on a charge of mutiny (on the Kinan) will come up before Judge McCully.

(Later Court news on pages 9 and 10).

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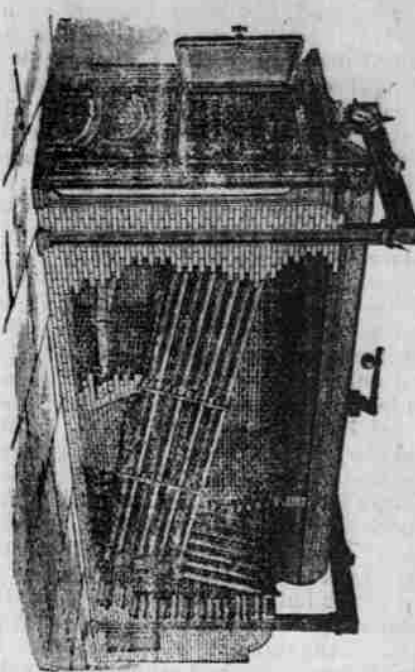
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